



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

May 28, 2004

Ms. Ruth Reyes  
Assistant City Attorney  
City of El Paso  
2 Civic Center Plaza  
El Paso, Texas 79901-1196

OR2004-4425

Dear Ms. Reyes:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 201368.

The City of El Paso (the "city") received a request for all proposal bids related to the Advertising and Educational Services for Solid Waste Management, El Paso Recycling Program. You inform us that you have released some of the requested information. You assert that the remaining information may be excepted from disclosure under sections 552.101 and 552.104 of the Government Code but take no position and make no argument regarding these exceptions. In addition, pursuant to section 552.305 of the Government Code, you notified two companies whose proprietary interests may be implicated by the request: Lara & Robinson Creative, Inc. ("L&R"); and the Gwinn Company d/b/a Advertising Ink ("Advertising Ink"). See Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining that statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure in certain circumstances). L&R claims its pricing information is excepted from disclosure by sections 552.104 and 552.110. Advertising Ink claims its proposal is excepted from disclosure by sections 552.101, 552.104, and 552.110. We have considered all claimed exceptions and reviewed the submitted information.

Initially, we address Advertising Ink's claim under section 552.101 of the Government Code. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This exception protects information that is considered to be confidential under other law. *See* Open Records Decision Nos. 611 at 1 (1992) (common law privacy), 600 at 4 (1992) (constitutional privacy), 478 at 2 (1987) (information made confidential by statute). However, neither Advertising Ink nor the city has directed our attention to any law under which any of the submitted information is deemed confidential for purposes of section 552.101. Furthermore, we note that only individuals, and not corporations, have a right to privacy. *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950); *see* Open Records Decision No. 192 (1978) (stating that right of privacy protects feelings and sensibilities of human beings). We note the presence of federal tax return information in information submitted by the city. Section 6103(a) of title 26 of the United States Code provides that tax return information is confidential. We note that the system must withhold tax return information, including taxpayer identification numbers, wherever it appears in the submitted information. Federal tax return information, including taxpayer identification numbers, are confidential under federal law. 26 U.S.C. § 6103(a). Therefore, the city must withhold federal tax return information under section 552.101 in conjunction with section 6103(a) of title 26 of the United States Code. No other portion of the submitted information is excepted from disclosure under section 552.101 of the Government Code.

L&R and Advertising Ink argue the applicability of section 552.104 of the Government Code. Section 552.104 excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." This section excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." The purpose of section 552.104 is to protect the interests of a governmental body, not third parties. *See* Open Records Decision No. 592 (1991). Because section 552.104 is designed to protect the interests of governmental bodies and not third parties, and the city has chosen not to argue section 552.104 in this instance, none of the submitted information may be withheld on this basis.

We next turn to L&R and Advertising Ink's claims under section 552.110 of the Government Code. Section 552.110 protects the property interests of private persons by excepting from disclosure two types of information: (1) trade secrets obtained from a person and privileged or confidential by statute or judicial decision and (2) commercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained.

The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts. *Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex.), *cert. denied*, 358 U.S. 898 (1958); *see also* Open Records Decision No. 552 at 2 (1990). Section 757 provides that a trade secret is

any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business . . . in that it is not simply information as to single or ephemeral events in the conduct of the business . . . . A trade secret is a process or device for continuous use in the operation of the business. . . . [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939). In determining whether particular information constitutes a trade secret, this office considers the Restatement's definition of trade secret as well as the Restatement's list of six trade secret factors. RESTATEMENT OF TORTS § 757 cmt. b (1939).<sup>1</sup> This office has held that if a governmental body takes no position with regard to the application of the trade secret branch of section 552.110 to requested information, we must accept a private person's claim for exception as valid under that branch if that person establishes a *prima facie* case for exception and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 at 5-6 (1990). However, we cannot conclude that section 552.110(a) applies unless it has been shown that the information meets the definition of a trade secret and the necessary factors have been demonstrated to establish a trade secret claim. See Open Records Decision No. 402 (1983).

Section 552.110(b) excepts from disclosure "[c]ommercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained." Gov't Code § 552.110(b). An entity will not meet its burden under section 552.110(b) by a mere conclusory assertion of a possibility of commercial harm. Cf. *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974). Normally, an interested

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The six factors that the Restatement gives as indicia of whether information constitutes a trade secret are:

(1) the extent to which the information is known outside of [the company]; (2) the extent to which it is known by employees and others involved in [the company's] business; (3) the extent of measures taken by [the company] to guard the secrecy of the information; (4) the value of the information to [the company] and [its] competitors; (5) the amount of effort or money expended by [the company] in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

RESTATEMENT OF TORTS § 757 cmt. b (1939); see also Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

third party raising section 552.110(b) must provide a specific factual or evidentiary showing that substantial competitive injury would likely result from disclosure of requested information. *See* Open Records Decision No. 639 at 4 (1996) (to prevent disclosure of commercial or financial information, party must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure).

L&R objects to the release of its pricing information under section 552.110(b). Having considered L&R's objections and the information at issue, we conclude that the city must withhold the pricing information for L&R that we have marked pursuant to section 552.110(b). We note L&R does not contend that the remaining portions of its bid are excepted from disclosure. The city must release the remaining information from L&R's proposal bid.

Advertising Ink objects to the release of its bid proposal and represents to this office that the release of this information will cause competitive harm. We note, however, that pricing information pertaining to a particular contract is generally not a trade secret because it is "simply information as to single or ephemeral events in the conduct of the business" rather than "a process or device for continuous use in the operation of the business." RESTATEMENT OF TORTS § 757 cmt. b (1939); *see Hyde Corp.*, 314 S.W.2d at 776; *See* Open Records Decision Nos. 319 at 3 (1982), 306 at 3 (1982). Furthermore, the terms of a contract with a governmental body are generally not excepted from public disclosure. *See* Gov't Code § 552.022(a)(3) (contracts with governmental body expressly made public); *see also* Open Records Decision No. 541 at 8 (1990) (public has interest in knowing terms of contract with state agency); *see generally* Freedom of Information Act Guide & Privacy Act Overview 213-221 (2000) (disclosure of prices is cost of doing business with government); *cf.* Open Records Decision No. 514 (1988) (public has interest in knowing prices charged by government contractors).

Having considered Advertising Ink's arguments, we find that the company has established that release of its client information would cause the company harm. Therefore the city must withhold such information under section 552.110(b). However, we find that Advertising Ink has made only conclusory allegations that release of the remaining information would cause the company substantial competitive injury and has provided no specific factual or evidentiary showing to support such allegations. Thus, none of the remaining information may be withheld pursuant to section 552.110(b). In addition, after considering the company's arguments, we find that Advertising Ink has neither shown that any of the remaining information at issue meets the definition of a trade secret nor demonstrated the necessary factors to establish a trade secret claim. Thus, we are unable to conclude that section 552.110(a) applies to any of the remaining information. *See* ORD 402. We have marked the information that the city must withhold pursuant to section 552.110. The remaining submitted information must be released.

In summary, you must withhold tax information under section 552.101 of the Government Code in conjunction with section 6103(a) of title 25 of the United States Code. You must withhold the marked pricing information for L&R under section 552.110(b) of the Government Code. You must also withhold Advertising Ink's marked customer information under section 552.110(b). The remaining submitted information must be released.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

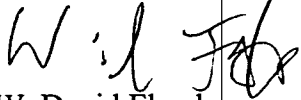
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



W. David Floyd  
Assistant Attorney General  
Open Records Division

WDF/sdk

Ref: ID# 201368

Enc. Submitted documents

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